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In the Supreme Court of the United States

October Term, 1979

No. 79-1467

GERROLD E. STEVENS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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No. .....

GERROLD E. STEVENS,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE and ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, Gerrold E. Stevens, prays for a Writ of Certiorari, to review the judgment of the United States Court of Appeals for the Tenth Circuit, which affirmed the judgment of the United States District Court for the District of Kansas, sustaining the Petitioner's conviction of the two counts he was charged with in a seven count Indictment, namely Counts I and VII; Count I of the Indictment alleging a Conspiracy to Distribute Heroin, a Schedule 1 controlled substance, in violation of 21 U.S.C.

841(a)(1) and 846; Count VII of the Indictment alleged Interstate Travel to Promote a Conspiracy to Distribute Heroin, in violation of 21 U.S.C. 846 and 18 U.S.C. 1952. The Trial Court on October 11, 1977, after overruling the Petitioner's post-trial Motions, sentenced the Petitioner to concurrent sentences of ten (10) years on Count I and five (5) years on Count VII.

OPINION BELOW

The United States District Court for the District of Kansas, the Trial Court, SUSTAINED the Petitioner's pre-trial Motion to Suppress "WIRETAPS" herein for a violation of Title III, however admitted into evidence, over the Petitioner's objection, evidence derived therefrom, the testimony of a co-defendant, William Deal, whose revelations did not come to pass from an independent source, but was the result of the suppressed "WIRETAPS", then only being revealed some thirty days subsequent to his apprehension, after official inducement, on the basis that his testimony became "attenuated". The Trial Court overruled the Petitioner's Motion to Dismiss the Indictment in that Counts I and VII fail to allege a public offense and further denied the Petitioner's Motion for Judgment of Acquittal as to Count VII, prefaced on the Government's failure to show consummation of an overt act in relation to a violation of 18 U.S.C. 1952. On Appeal, the United States Court of Appeals, Tenth Circuit, affirmed the District Court's judgment on November 15, 1979, further denied the Petitioner's Motion for Rehearing en banc on February 27, 1980, *the decision of the United States Court of Appeals, Tenth Circuit, is not reported as yet, however, the Court's decision is attached hereto as Appendix A, the Court's Order denying the Petitioner's Petition for Rehearing En Banc on February 27, 1980, is attached hereto as Appendix B.*

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1254(1), along with the Court's Rule 19(b).

The issues, along with the Federal Constitutional questions sought to be reviewed by this Honorable Court, were developed, raised and re-raised in all courts below, which is readily evidenced in reviewing the Opinion of the United States Court of Appeals for the Tenth Circuit. (A. 8-10)

QUESTIONS PRESENTED

The Federal Constitutional issues sought to be resolved herein are of extreme importance as is the uniqueness noted in the Opinion. The United States Court of Appeals for the Tenth Circuit's Opinion is both divisible and contrary to existing precedent:

(1) In addition to the Fourth Amendment of the United States Constitution applying to Title III, 18 U.S.C. 2510 et seq., this is not to the exclusion of the Act's own safeguards, 18 U.S.C. 2515 and 18 U.S.C. 2518(10)(a). If evidence is obtained in violation of Title III or is derivative thereto, is attenuation available that comes to pass through official inducement?

(2) Does a Conspiracy Indictment pursuant to 21 U.S.C. 846, relying on the substantive violation of 21 U.S.C. 841(a)(1), which fails to plead the elements of the substantive offense, fail to state a public offense?

(3) To prove a conspiracy violation pursuant to 21 U.S.C. 846, in violation of the Travel Act, 18 U.S.C. 1952, is it necessary to prove commission of an overt act in violation of law performed after travel in interstate commerce to sustain a conviction?

STATUTES INVOLVED

The Fourth Amendment to the United States Constitution (U.S. Const., Amend. IV) provides:

> "The right of the people to be secure in either house, person, papers and effects, against unreasonable searches and seizure, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and persons or things to be seized."

18 U.S.C. 2515 provides:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

18 U.S.C. 2518(10)(a) provides:

> "Any aggrieved person in any trial hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication, intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;

> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice."

STATEMENT OF THE CASE

This appeal is from a jury verdict finding the defendant guilty under Counts I and VII of a seven count indictment. Count I charged that the defendant and others "[f]rom on or about April of 1976 up to and including the date of this indictment" "willfully and knowingly did combine, conspire, confederate and agree together and with other persons to the grand jurors unnamed or unknown, to distribute heroin, a Schedule 1 controlled substance . . . in violation of 21 U.S.C. §841(a)(1) and §846." (R.,Vol.I,1.) A number of overt acts in furtherance of the conspiracy were alleged. Count VII, submitted to the jury and hereafter referred to as Count II, charged that "[o]n or about December 27, 1976 . . . Gerrold E. Stevens and William R. Deal did knowingly and willfully travel interstate from Kansas to Las Vegas, Nevada, with the intent

to promote a conspiracy to distribute heroin in violation of 21 U.S.C. §846 and thereafter did promote or attempt to promote said unlawful activity, in violation of 18 U.S.C. §1952." (R.,Vol.I,1.)

On March 15, 1977, the defendant filed motions to dismiss the indictment on the grounds that it did not allege a public offense and that it was obtained by use of illegally seized evidence. (R.,Vol.I,7,10.) The defendant also filed a motion to suppress "any and all conversations that were recorded, transcribed, overheard, or invaded as a result of the District Court's of Wyandotte County Order allowing eavesdropping or interception herein and for a further Order suppressing any and all information, leads, or interceptions that result as a consequence thereto. . ." (R.,Vol. I,16.) The government countered with a motion for a ruling in advance of trial as to the admissibility of testimony of a co-conspirator, William Deal, against the defendant. (R.,Vol.II,3.) Deal had been charged as a co-conspirator with Stevens but subsequently pleaded guilty and gave a lengthy statement to the government. (R.,Vol.I, 109.) The government wished to introduce the substance of the information contained in that statement by calling Deal to the witness stand. On June 13, 1977, the trial court sustained the motion to suppress filed by the defendant and then conducted a hearing as to whether Deal's testimony could be used against the defendant. (R.,Vol.II 3.) The trial court ultimately denied the motion to dismiss (R.,Vol.I,75.) and permitted Deal to testify. (R.,Vol. III,8.) Trial was held on August 23-24, 1977, and resulted in the conviction of the defendant on August 25, 1977. (R.,Vol.I,80.) Thereafter, the defendant filed a motion for a new trial and renewed his motion to dismiss the indictment, both of which were overruled by the trial court. (R.,Vol.I,81,85.) On October 11, 1977, the trial court sentenced the defendant to concurrent sentences of ten years on Count I and five years on Count II. A notice of appeal was filed on October 18, 1977. (R.,Vol.I,94.)

At the pretrial hearing on June 13, 1977, the government offered testimony from three witnesses in support of its contentions that the testimony of Deal was obtained from a source independent of the illegal wiretaps and that the causal connection between the wiretap evidence and Deal's testimony was so attenuated as to dissipate the taint. John M. Hinkle, special agent with the federal Drug Enforcement Administration, explained that "a potential informant came to our office" in July of 1976 and "gave me several names of individuals that he knew were selling heroin in the Kansas City metropolitan area." One was that of William Deal. (R.,Vol.II,6.) Later, during the first week of November, 1976, officers of the Overland Park Police Department and the Kansas Bureau of Investigation mentioned the name of William Deal to Hinkle as a heroin dealer. (R.,Vol.II,9.) Thereafter, on November 30, 1976, the first of two wiretaps was instituted in an attempt to obtain evidence of Deal's illegal activity, according to Hinkle. (R.,Vol.II,14.) The procedure followed in obtaining authorization to make the taps from a Kansas district court judge was found by the trial court to have been defective in both instances. (R.,Vol.I,75, Vol.II,3.) The second witness was David LeQuire, an Overland Park police detective, who testified that Deal's name had been mentioned by a "confidential source" (R.,Vol.II,26.) but that the police department's evidence of that was limited to surveillance of one George Hoobler, who visited Deal's residence on two occasions on September 17, 1976. (R.,Vol. II,24,27.) Finally, Larry J. Sigler, of the Kansas Bureau of Investigation, testified that in the course of his undercover purchase of drugs, Deal's name had been mentioned. (R.,Vol.II,32.) However, Sigler did not attempt to obtain

any type of search warrant or attempt to search Deal's residence. (R.,Vol.II,6.)

After the trial court found the testimony of Deal admissible, the case proceeded to trial. The first and primary witness called by the government was Deal. Deal testified as to his gradually increasing involvement in narcotics dealing after his release on parole from the Leavenworth Penitentiary in May of 1974. (R.,Vol.II,18-27.) Deal eventually accumulated the sum of $50,000, of which he used $30,000 to purchase, in late November, 1976, a one-half interest in a retail store operated by the defendant Stevens. (R.,Vol.II,28-30.) Thereafter, according to Deal, he and Stevens changed their agreement such that Deal gave Stevens a one-half interest in the retail store and a related fencing and heroin business operated out of the store. (R.,Vol.II,31.)

According to Deal, business was good and in late December, 1976, he and the defendant flew from Kansas City International Airport to Las Vegas "for fun." (R.,Vol. III,35,70.) The government substantiated that with testimony from a TWA official to the effect that two individuals had flown from Kansas City to Las Vegas on December 27, 1976. (R.,Vol.III,112-114.) The tickets were issued in the names of "Mrs. William Deal" and "Mr. J. Stevens." (R.,Vol.III,115.) Deal testified that he bought the tickets for the trip and that both he and the defendant took girl friends along. (R.,Vol.III,36.) According to Deal, an additional purpose of the trip was to meet one George Childress, a Los Angeles heroin supplier with whom they had been dealing. Deal testified that they wished to discuss a large buy. (R.,Vol.III,35-36.) Prior to flying to Las Vegas, Deal and Childress agreed that Childress would meet them in Las Vegas. (R.,Vol.III,35-36.) However, Childress did not do so and instead invited Deal and the

defendant Stevens, in a phone conversation with Deal, to come to his home in Los Angeles. They did not do so, but returned to Kansas City. (R.,Vol.III,37,71.) The defendant Stevens, according to Deal, never talked to Childress or met him. (R.,Vol.III,71-72.)

Childress also testified. He traced the course of dealings by which Deal initiated his drug business (R.,Vol.III, 126-131.) and said that in December, 1976, Deal asked that he come to Kansas City to discuss a large shipment of drugs. (R.,Vol.III,132.) Childress did not do so but made arrangements with Deal to meet him in Las Vegas to discuss the matter. (R.,Vol.III,133-134.) Childress, however, did not go to Las Vegas. (R.,Vol.III,134.)

In sum, while the government's evidence did show that Deal contacted Childress while he was in Las Vegas, it did not indicate that they discussed any specifics of a drug deal. (R.,Vol.III,135.) Rather, the conversation was confined to discussion of why Childress was unable to come to Las Vegas and then an invitation by Childress that Deal and the defendant come to Los Angeles. (R.,Vol. III,37.)

REASONS FOR GRANTING THE WRIT

A. The Opinion of the United States Court of Appeals for the Tenth Circuit Is in Conflict With Opinions of Other Circuits, Completely Overlooks the Prohibitions Contained in Title III and Additionally Misconstrues and Repudiates Decisions of This Honorable Court.

The decision of the United States Court of Appeals for the Tenth Circuit contradicts decisions of three circutis decided under the requirements of *United States v. Ceccolini*, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978). See *United States v. Rubalcava-Montoya*, 597 F.2d 137 (8th Cir. 1979) (testimony of witnesses arrested as a direct result of illegal search excluded); *United States v. Scios*, 590 F.2d 956 (D.C. Cir. 1978) (testimony given by witness arrested as a result of illegal search and who testified under threat of a contempt order was properly suppressed); *United States v. Cruz*, 581 F.2d 535 (5th Cir. 1978) (witnesses detained until trial as the result of illegal stop of automobile should not have been permitted to testify).

In reviewing the United States Court of Appeals' Opinion herein, without intention to be blasphemous, I find several areas based on the judicial findings of the trial court that were affirmed by the circuit that if we are to utilize same with existing precedent it becomes impossible to reconcile.

In reviewing pages 4, 5 and 6 of the circuit's Opinion, we note the circuit found, as did the trial court, that the petitioner and the witness Deal, whose testimony the petitioner sought to suppress were both subjected to illegal wiretapping that ultimately caused and was solely responsible for the witness Deal's arrest. The trial court finding that the wiretaps were illegal. Deal thereafter

testified against the petitioner, over the petitioner's objection, his testimony being admissible because of the trial court's findings, along with the circuit's findings, that Deal's testimony became "attenuated". *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939). The basis for Deal's testimony developing attenuation may be viewed in the circuit's Opinion (A. 8-9), "Deal's testimony came to pass independently of the illegal wiretaps and in addition was forthcoming to change his life-style and stay out of trouble." The difficulty in reconciling the circuit's wisdom thereafter immediately comes to pass from the circuit's findings that Deal's arrest was a direct result of the illegal wiretaps, being responsible for his arrest, same happening on January 7, 1977. His revelations only coming to light after official inducement, however, the record further reflects that Deal testified during the course of the trial that he may well not have made any revelations to the authorities absent "DEALS'S DEAL". (R.,Vol.III,80.) Further, the authorities readily acknowledged absent the wiretaps that they did not possess probable cause to arrest or have a prosecutable case against the witness Deal, nor would the witness give the officers any information until after "DEAL'S DEAL" was consummated. (R.,Vol.II,6-32.) In addition, the full extent of Deal's blessings may be viewed in Volume III of the record, page 43, commencing at line 15. Thereafter, the circuit's Opinion divorces itself from the circuit's own findings and in support of the attenuation sought herein advances a new legal tenet, the "MAYBE TEST", which is readily viewed in the circuit's Opinion, as follows:

> The authorities "MAYBE" could have developed a good case against Deal. (A. 9)
>
> Deal maybe knew the authorities could have developed a good case against him. (A. 9)

> The witness Etter, during the defendant's trial, reflected Deal was his source of heroin, however the first knowledge that the authorities had in this regard was Etter's statement provided to Hinkle in April, 1977. (R.,Vol.II,9.) However, "MAYBE" the authorities anticipated this four months belated piece of information. Deal could have challenged the wiretaps, however he did not. "MAYBE" this is supportive of his desire to change his life style, of if we are to apply our new legal tenet, "MAYBE" his waiver was the result of INCOMPETENCE, which from the trial court's findings readily appears to be the case. (A. 8-9)
>
> Last but not least "MAYBE DEAL'S FOR DEAL", so determined by this Circuit to be the result of extensive plea bargaining, brought about Deal's desire to change his life style and stay out of trouble. But, just "MAYBE" the Circuit's analysis in this regard is without foundation in the record. (See in particular R.,Vol.III,80.)

In further review of the record herein, along with the issues raised by the petitioner, we note that the petitioner's objection to Deal's testimony was a two-edged objection, but one of the edges was broached in the circuit's Opinion. The Opinion is totally void as to the petitioner's position that Deal's testimony was additionally inadmissible as the witness's testimony was further excluded as the exclusion is mandated by statute, 18 U.S.C. 2515, 18 U.S.C. 2518(10)(a). The availability of the suppression remedy for a violation of the statutory scheme of Title III, as distinguished from constitutional violations, turns on the provisions of the act itself rather than on the judicially fashioned exclusionary rule aimed at deterring violations of the Fourth Amendment. *United States v. Giordano*, 416 U.S. 505, 40 L.Ed.2d 341; *Gelbard v. United States*, 408 U.S. 41, 33 L.Ed.2d 179. The eavesdropping orders found wanting herein were issued by the District Court of Wyandotte County, Kansas, pursuant to K.S.A. 22-2514, the applications made in relation thereto being clearly unauthorized. *In re Olander*, 213 Kan. 282, 515 P.2d 1211 (1973), my work product. In addition, the Kansas courts hold that for violations of the statutory scheme allowing eavesdropping, suppression turns on the act itself rather than on the exclusionary rule. *State v. Dowdy*, 222 Kan. 118, 125, 563 P.2d 425 (1977).

The Opinion of the circuit entirely failed to analyze *United States v. Ceccolini*, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978), in which the circuit, in an Opinion by Mr. Justice Rehnquist, dealt specifically with the proper means of analyzing a claim that testimony is tainted by a Fourth Amendment violation. In that case, the court specified the factors that must be considered in determining whether to exclude the testimony of a witness because of a Fourth Amendment violation. In the words of the Fifth Circuit *en banc*:

> [I]f a witness is located as a result of a search unconstitutional under the Fourth Amendment, the admissibility of the witness's testimony depends upon a balancing test; the Court should consider: (1) the degree of free will exercised by the witness in testifying (because the greater the willingness of the witness to testify freely, the greater the likelihood that he would have been discovered by legal means and, consequently, the smaller the incentive to the police to conduct an illegal search to discover witnesses); (2) the time, place and manner of the initial questioning of the witness (as indicating whether the statements are truly the product of detached reflection and the witness's desire to be cooperative and whether the illegality that led to discovery of the witness

played any meaningful part in the witness's willingness to testify; and (3) the relationship of the purpose of the originally illegal search to the subject of the testimony (because automatic exclusion would perpetually disable a witness from testifying about relevant and material facts regardless of how unrelated these were to the purpose of the search and would be of little deterrence to illegal searches).

United States v. Cruz, 581 F.2d 535, 543 (5th Cir. 1978). The Opinion of the court focuses only upon the witness's "free will" to the total exclusion of the other elements.

The circuit's decision contains no consideration whatsoever as to whether exclusion of the testimony would tend to deter unconstitutional police conduct. In this case, the record reflects that law enforcement officers had heard informants name William Deal, the witness in question, as a heroin dealer but had no evidence against him sufficient to form probable cause to either arrest him or search his premises. Rather, Deal was arrested as a direct result of information acquired by illegal wiretaps. The effect of this circuit's decision is to condone any illegal arrest based upon illegal wiretaps for the purpose of convicting an alleged co-conspirator. Such a result is entirely inconsistent with the policy of deterrence underlying the exclusionary rule.

The circuit's decision also fails to give sufficient consideration to the time, place and manner of the initial questioning of the witness to determine whether Deal's statement was a product of detached reflection in his desire to be cooperative and whether the illegal wiretaps played any meaningful part in Deal's willingness to testify. The record reflects that Deal did not agree to testify until a month after his arrest, and after the plea bargain had been struck with the government. Deal refused to provide

any information until after that plea bargain had been made, and would not have talked had there not been a plea bargain. The facts of this case are therefore quite dissimilar to those of *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), in which the court permitted the statement of a co-defendant who had been illegally arrested without probable cause but had made the statement after being released on his own recognizance and returning voluntarily several days later. To the contrary, the facts of this case are much more similar to the circumstances surrounding a statement given by the other defendant in *Wong Sun v. United States*. That defendant made a statement shortly after his illegal arrest, while a number of police agents were in his direct presence. The court said that it could not reasonably be determined that the defendant's response to the interrogation "was sufficiently an act of free will to purge the primary taint" of the illegal arrest. 371 U.S. at 486. In that regard, the petitioner wishes to remind the court that in *United States v. Ceccolini* this Honorable Court stated that the statements must be "truly the product of detached reflection and a desire to be cooperative on the part of the witness". 98 S.Ct. at 1060. Moreover, the illegality must not play any "meaingful part" in the witness's willingness to testify. *Id.* There is no evidence in the record to rebut "the logical inference . . . that the incriminating 'evidence' discovered in the course of the illegal search was used to persuade . . . [the] witness . . . to testify." *United States v. Rubalcava-Montoya*, 597 F.2d 137 (8th Cir. 1979).

The circuit's Opinion also fails to analyze the degree of free will exercised by the witness. *United States v. Ceccolini* requires that the decision of the witness to testify be not coerced or induced by the consequences of the illegal search. *United States v. Rubalcava-Montoya, supra;*

United States v. Scios, 590 F.2d 956 (D.C. Cir. 1978). The circumstances of this case hardly indicate that Deal agreed to testify out of his own free will. As the circuit's Opinion admits, the testimony came as part of a plea bargain. (Slip Op. at 5.) Contrary to the assertions of the circuit, an agreement to testify as part of a plea bargain by which the witness avoids a more severe charge and potentially more severe sentence is little different from the possibility of a contempt citation upon which suppression was ordered in *United States v. Scios*. The circuit's holding cannot be reconciled with its findings that Deal's arrest was a direct result of the illegal wiretaps. Deal's testimony came to pass only after direct official inducement and Deal himself admitted during the course of the trial that he would not have testified absent "DEAL'S DEAL".

The circuit's Opinion also entirely fails to mention or discuss 18 U.S.C. §2515 and 18 U.S.C. §2518(10). Those statutes, taken together, require a federal court to exclude any evidence derived from an illegal wiretap, which the circuit found that both Deal, along with "DEAL'S DEAL" were the result of the wiretap suppressed herein. From these findings, if none other, Deal's testimony should have been suppressed. *United States v. Giordano*, 416 U.S. 505, 528, 529, 94 S.Ct. 1820, 40 L.Ed.2d 341; *Gelbard v. United States*, 408 U.S. 41, 58, 92 S.Ct. 2357, 33 L.Ed.2d 179. Although the legislative history reflects no congressional intent to broaden the rule reflected in *Wong Sun v. United States; Nardone v. United States*, 308 U.S. 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939), and *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920), it does reflect legislative recognition of the validity of the policy upon which the exclusionary rule is based—deterrence of illegal police conduct. In this instance, the circuit did not even consider the motives of the officers involved in the illegal wiretaps, a factor that is particularly

relevant to the required analysis. *See United States v. Ceccolini, supra*, and *Scott v. United States*, 436 U.S. 128, 98 S.Ct. 1717, 1724 n.13, 56 L.Ed.2d 168 (1978). The circuit also failed to consider the effect of its decision upon illegal police conduct. That effect is clearly to condone an illegal search that results in coerced testimony from an unwilling witness. Such a result is directly contrary to the policy underlying the exclusionary rule, along with repealing by implication the provisions of 18 U.S.C. 2515 and 18 U.S.C. 2518(10)(a) and the further repudiation of the wisdoms viewed in both *Giordano* and *Gelbard*.

B. The Court's Opinion Further Takes Exception to Existing Precedent That the Indictment Must Plead the Elements of the Substantive Offense to State a Public Offense.

In reviewing the circuit's Opinion, pages 6, 7 and 8, we note the substantive offense relied on in both Count I and Count VII (II) in support of the alleged conspiracy in violation of 21 U.S.C. 846 is a violation of 21 U.S.C. 841(a)(1), the distribution of heroin, a Schedule I controlled substance. The elements of the substantive offense in both counts being intentional and knowing distribution. In both counts we note a complete void as to the required elements of the underlying offense . The circuit concluded in its Opinion (A 7,8), that by virtue of the fact the charging portion of the conspiracy allegation in each count alleged the conspiracy came to pass willfully and knowingly in violation of 21 U.S.C. 846, which clearly does not require the elements required for a violation of 21 U.S.C. 841(a)(1), that to allege the elements of the underlying offense would amount to surplusage. The court further relies on Rule 52(a) to further reject the petitioner's argument. This reasoning had on two occasions previously been ruled on by the United States Court of Appeals for the Tenth

Circuit, and the circuit, noting the wisdoms of this Honorable Court in *Dennis v. United States,* 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966), rejected same in both instances. The circuit's reasoning being "there is no magic to the words used to allege guilty knowledge." *Nelson v. United States,* 406 F.2d 1136, 1138 (10th Cir. 1969); *Robinson v. United States,* 263 F.2d 911, 912 (10th Cir. 1959).

In addition, Count VII (II) is also defective for another reason. It contains no allegations of the overt acts upon which the conspiracy charge is based. The petitioner recognizes that the Tenth Circuit held, in *United States v. King,* 521 F.2d 61 (10th Cir. 1975), that an indictment under only Section 846 need not allege the overt acts that the government intends to use to establish a conspiracy. However, the indictment in this case is not based upon Section 846 standing by itself but rather the government uses that section as a bootstrap for a Travel Act charge. It can prove a violation only by showing that the petitioner traveled in interstate commerce to promote some "unlawful activity". In this case the government contends the activity was a Section 846 conspiracy to distribute drugs. That conspiracy could be "unlawful" only if it had been completed prior to the trip by an overt act in furtherance of the agreement. *Carlson v. United States,* 187 F.2d 366 (10th Cir. 1951), *cert. denied,* 341 U.S. 940, 71 S.Ct. 1000, 95 L.Ed. 1367 (1951).

"The gist of the offense of a conspiracy is an agreement among the conspirators to commit an offense, attended by an overt act by one or more of the conspirators to effect the object of the conspiracy." *Hudspeth v. McDonald,* 120 F.2d 962, 965 (10th Cir. 1941), *cert. denied,* 314 U.S. 617, 62 S.Ct. 110, 86 L.Ed. 496 (1941). *See also United States v. Falcone,* 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940); *Hyde v. United States,* 225 U.S. 347, 32 S.Ct. 793, 56 L.Ed. 1114 (1911).

In sum, the "conspiracy" under Section 846 is not unlawful absent an overt act. The United States Court of Appeals for the Tenth Circuit recognized in *United States v. King* by reversing a conviction in which the jury was not told that the government must prove an overt act. "Conspiracy is not punishable as a state of mind and becomes punishable only if completed by an overt act by one or more of the conspirators." 521 F.2d at 63. Thus, an indictment, such as this, that contains no indication of overt acts in furtherance of a conspiracy committed prior to the alleged interstate travel does not state a public offense because it does not allege that the travel promoted "unlawful activity". The trial court attempted to correct that mistake by instructing the jury that the government must first prove a conspiracy furthered by one or more overt acts. It relied in its instructions upon the same overt acts alleged in Count I. (R.,Vol.VI,271.) However, amendment of the indictment in such a manner is not permitted (*Joplin Mercantile Co. v. United States,* 236 U.S. 531, 531 S.Ct. 549, 59 L.Ed. 705 (1914)) and Count VII (II) should therefore also be dismissed because it does not contain an allegation that the interstate travel promoted unlawful activity.

C. The Court's Opinion Additionally Denies Decisions of This Court That Require a Violation of the Travel Act, 18 U.S.C. §1952, That the Interstate Travel Must Be More Than "Minimal and Incidental".

Specifically, the petitioner submits that the record, even when viewed in a light most favorable to the government, does not contain sufficient substantial evidence to support a jury verdict of guilty beyond a reasonable doubt. *See United States v. Guerrero,* 517 F.2d 528 (10th Cir. 1975).

The elements of proof under the Travel Act are well established. "In order to mount a successful prosecution under those portions of the travel act applicable here, the following elements must be proved: (1) that an accused voluntarily used the facilities of interstate commerce; (2) that the accused attempted to or did in fact promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of any of certain statutorily defined activities; and (3) that the accused formed a specific intent to promote, manage, establish, carry on or facilitate one of the prohibited activities." *United States v. Gibson Specialty Company,* 507 F.2d 446, 449 (9th Cir. 1974). *See also United States v. Villano,* 529 F.2d 1046 (10th Cir. 1976), *cert. denied,* 426 U.S. 953, 96 S.Ct. 3180 (1976); *United States v. Prince,* 529 F.2d 1108 (6th Cir. 1976); *Spinelli v. United States,* 382 F.2d 871 (8th Cir. 1967), *rev'd on other grounds,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). Thus, a conviction under the Travel Act can be upheld only if there is evidence of each of those three elements. Evidence as to only one or two will not suffice. "[T]he scope of the act, although broad indeed, is not unlimited." *United States v. Gibson Specialty Company, supra.* "Congress, by passing 18 U.S.C. §1952, did not intend to make every conceivable crime that occurs at a motel or hotel into a federal offense punishable in the federal courts." *United States v. Brouillette,* 478 F.2d 1171, 1178 (5th Cir. 1973).

The indictment charged a Travel Act violation only for a trip taken by the defendant to Las Vegas in late December, 1976. Concededly, the record contains evidence of various other incidents in interstate commerce that could constitute Travel Act violations. However, as to this particular trip the prosecution failed to prove that the defendant traveled interstate with the intent to facilitate or promote unlawful activity and that any acts that

he engaged in immediately after such trip did in fact facilitate or promote unlawful activity. Therefore, any any conviction for a Travel Act violation must of necessity have been based upon activity not charged in the indictment. And, under the well-settled rule, a defendant may not be convicted on the basis of an action not charged in the indictment. *United States v. Lynn,* 461 F.2d 759 (10th Cir. 1972).

As this court has specifically noted, Congress in enacting Section 1952 did not intend to "transform relevantly minor state offenses into federal felonies." *Rewis v. United States,* 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971). Thus, the plain language of Section 1952 requires that the activity in question violates the law of the jurisdiction in which it occurs. *United States v. Zemater,* 501 F.2d 540 (7th Cir. 1974). Moreover, the act that forms the conduct in furtherance of an illegal activity must occur *after* rather than before the interstate travel. *United States v. Zemater, supra; United States v. Villano,* 529 F.2d 1046 (10th Cir. 1976), *cert. denied,* 426 U.S. 953, 96 S.Ct. 3180 (1976). Finally, the prosecution must prove intent to use interstate commerce to facilitate some unlawful activity. *United States v. Gibson Specialty Company,* 507 F.2d 446 (9th Cir. 1974). The uncontradicted evidence in the record that the purpose of the Las Vegas trip was pleasure does not support a conviction under those standards.

The evidence discloses that the trip to Las Vegas was, at most, tenuously incidental to any unlawful activity in which the defendant was engaged. The purpose of the trip was, as was just noted, pleasure. The defendant took his girl friend and fully intended to spend an enjoyable few days on vacation. The Las Vegas trip therefore falls within the rule that when the use of an interstate

facility is "a matter of happenstance" and "minimal and incidental" to the operation, no Section 1952 crime has been committed. *United States v. McCormick*, 442 F.2d 316, 318 (7th Cir. 1971). *See also United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974), *cert. denied*, 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146 (1974); *United States v. Altobella*, 442 F.2d 310 (7th Cir. 1971).

The circuit correctly noted that an overt act performed after travel in interstate commerce is required to support a conviction under the Travel Act, 18 U.S.C. 1952. The sole basis upon which the conviction in this case rests is a single telephone call made by the co-defendant, the same William Deal who testified against the defendant. (Slip Op. at 9.) That telephone call in no way furthered the alleged drug-buying scheme. *See United States v. Botticello*, 422 F.2d 832 (2nd Cir. 1970); *United States v. Hawthorne*, 356 F.2d 740 (4th Cir. 1966), *cert. denied*, 384 U.S. 908, 86 S.Ct. 1344, 16 L.Ed.2d 360 (1966).

CONCLUSION

To affirm the petitioner's conviction herein on the basis of the witness Deal's testimony, it necessitates more than the United States Court of Appeals for the Tenth Circuit's new legal tenet, the "MAYBE" TEST", to find the witness Deal's testimony became attenuated, it further requires that the court deny the existence of "DEAL'S DEAL" and the uncontroverted evidence that Deal's revelations only came into being after official inducement, along with the sanctioning of the complete void, as to the prohibitions found within Title III for interceptions obtained in violation of the Act, found within the circuit's Opinion.

Further, if equal application of the law still serves as the cornerstone of Due Process, then the facts viewed herein most assuredly merit this Honorable Court's attention, as the circuit not only denies or avoids this court's fiat, it attempts to apply its own teachings divisibly.

Very respectfully submitted,

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APPENDIX

APPENDIX A

(Filed November 15, 1979)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77-1937
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GERROLD E. STEVENS,
Defendant-Appellant.

Appeal From the United States District Court
For the District of Kansas
(D.C. 77-20025-01)

John C. Humpage, Topeka, Kansas, for Defendant-Appellant.

Roger M. Theis, Assistant United States Attorney, (James P. Buchele, United States Attorney, and Bruce E. Miller, Assistant United States Attorney, with him on the briefs), Topeka, Kansas, for Plaintiff-Appellee.

Before SETH, Chief Judge, HOLLOWAY and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

Appellant Gerrold E. Stevens was convicted by a jury on charges of conspiracy to distribute heroin, a controlled

substance, and interstate travel to promote a conspiracy to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1), 846 and 18 U.S.C. § 1952.

On appeal numerous errors are asserted—1) testimony of co-conspirator William Deal was tainted by an illegal wiretap and should not have been admitted; 2) the indictment should have been dismissed for failure to charge a public offense; 3) the prosecution failed to prove a travel act violation; 4) the content of the indictment varied from the proof offered at trial on the travel act count; and 5) the sentences imposed were illegal because the counts and proof showed a single conspiracy.

Evidence admitted at trial showed that Deal, a parolee, moved to Kansas City, Kansas, in May 1974 and shortly thereafter started supporting a heroin habit by shoplifting. Stevens ran a retail store in that city which also served as a front for a fencing operation. Deal disposed of his shoplifted goods through Stevens. He also aided Stevens in the pick-up and delivery of stolen property from other shoplifters.

In 1976 Deal began acquiring heroin for resale in Kansas City from George Childress, who lived in Los Angeles. Deal made numerous trips to Los Angeles to obtain heroin from Childress and later began to receive shipments from Childress through couriers whom he would meet at the Kansas City airport. About November 1976 Deal became an equal partner with Stevens in his store operation. Soon thereafter the arrangement was revised to include an equal partnership in the fencing operation and in Deal's heroin sales. Stevens then became aware of Deal's arrangement with Childress, including the price and amounts of heroin obtained from him.

In late December 1976, Stevens, Deal, and two female friends left for Las Vegas, paying for the trip with profits

from their business. There were two purposes for the trip—a vacation and a meeting with Childress to discuss a possible $250,000 heroin buy. Childress did not show up in Las Vegas, but was called at his home in Los Angeles by Deal while he and Stevens were in Las Vegas. A few days after Deal and Stevens returned to Kansas City, Deal was arrested at Kansas City International Airport immediately after taking possession of ten ounces of heroin from a Childress courier. Stevens and six others were subsequently arrested on related charges.

I

The events culminating in Stevens' indictment began as part of a Drug Enforcement Administration (DEA) investigation in cooperation with local law enforcement agencies in the Kansas City area. According to the record, DEA agent John Hinkle, Overland Park police, and Kansas Bureau of Investigation agents had information from several different informants and undercover agents that Deal was involved in local heroin traffic. Police agents had made heroin buys from at least one person who claimed his supplier was obtaining heroin from Deal, and an informer had claimed to be present when Deal sold heroin. But because Deal would not sell directly to persons he did not know, police authorities believed they did not have sufficient evidence to indict Deal.

Thereafter, wiretaps on three telephones, including those of Deal and the business operated by Stevens, authorized by a state district judge, resulted in information leading to Deal's arrest. These wiretaps were found to be illegal by the federal trial judge in this case. Initially Deal refused to cooperate with the prosecution. But after consultation with his attorney and a plea bargain had been agreed upon, and more than a month following his arrest, Deal made statements implicating Stevens and

others. Under the plea bargain the possession of heroin charge against Deal was dropped, he pleaded guilty to the conspiracy charge and was assured of a sentence not longer than five years.

Ruling upon a pretrial motion to exclude Deal's proposed testimony against Stevens, the court held it was admissible

> on the ground that Deal's identity and his illegal narcotics dealings were known to law enforcement officers prior to the illegal wiretaps and further, and of even greater significance, Deal's statement to law enforcement officers and his decision to plead guilty and to testify against his co-defendants were wholly independence of the illegal wiretaps.

That ruling is challenged on appeal on the ground that Deal's testimony implicating Stevens was "fruit of the poisonous tree." We must therefore determine whether Deal's testimony is sufficiently attenuated from the exploitation of the illegal wiretaps to be purged of taint.

The present case is similar to Wong Sun v. United States, 371 U.S. 471 (1963), and our decision in United States v. Beasley, 485 F.2d 60 (10th Cir. 1973), *cert. denied*, 416 U.S. 941 (1974). In *Wong Sun* the statement of a person unlawfully arrested who had been released and had returned voluntarily several days later to make the statement, was held to be admissible. "The connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.'" 371 U.S. at 491. In *Beasley* an accessory who had been arrested illegally testified against the defendants, apparently from a desire to help herself. This Circuit held the statement could be found to be voluntary and sufficiently attenuated from her illegal arrest.

> Her decision to testify came some three days after the arrest, and this time separation, together with the other circumstances, creates a high degree of probability that she exercised her own volition which leads us to conclude that there was no exploitation of the illegal arrest.

485 F.2d at 64 (footnote omitted).

The circumstances of the present case indicate sufficient voluntariness. To be sure the testimony came as part of a plea bargain, but that does not diminish the volition of coming forward. *See* United States v. Hoffman, 385 F.2d 501 (7th Cir. 1967), *cert. denied*, 390 U.S. 1031 (1968); United States v. Beasley, 485 F.2d 60 (10th Cir. 1973), *cert. denied*, 416 U.S. 941 (1974). *Cf.* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (threatening a defendant with greater punishment if he refuses to plead guilty to a lesser charge does not violate due process); United States v. Crouch, 528 F.2d 625 (7th Cir.), *cert. denied*, 429 U.S. 900 (1976) (testifying under immunity). Even though the authorities believed they did not have a case sufficient for prosecution at the time of the illegal wiretaps, it is possible they could have developed a good case against Deal independent of the wiretaps, and he could have been well aware of this possibility. A government agent had made a purchase of heroin from James Etter, who testified at trial that Deal was his supply source. Also, it is significant that the witness and some of the information he provided was known through independent sources. *See* United States v. Crouch, 528 U.S. 625 (7th Cir.), *cert. denied*, 429 U.S. 900 (1976). Personal testimony from a witness is more likely to be free of the taint of illegality than documents or objects obtained as a result of an unlawful search or interception. *See* United States v. Ceccolini, 435 U.S. 268 (1978).

The court in United States v. Scios, 590 F.2d 956, 960 (D.C. Cir. 1978) declared that, "for an act of free will to operate as a dissipation of taint, it must occur in circumstances devoid of coercion." *See also* United States v. Houltin, 566 F.2d 1027, 1034 (5th Cir.), *cert. denied*, ... U.S. ..... (1978) (J. Wisdom, dissenting). But *Scios* and *Houltin* involved testimony of persons who faced contempt citations if they did not testify. The instant situation is clearly distinguishable. Deal was entitled to raise the defense of the illegality of the wiretaps and the inadmissibility of evidence resulting therefrom in the case against him. But he offered to testify; his statement declared this decision was in part motivated by a desire "to change his life-style and stay out of trouble."

We hold the trial court properly admitted the testimony of William Deal.

II

We turn next to the issue whether the indictment should have been dismissed for failure to state a public offense. The crux of Stevens' argument is that the conspiracy charge failed to allege he conspired "willfully and intentionally to distribute heroin," and that the travel act charge did not allege "the purpose of the conspiracy was to knowingly and intentionally distribute heroin." We believe a normal reading of the charges involved in the instant case[1] conveys the understanding that the distribu-

1. The conspiracy charge alleged Stevens "wilfully and knowingly did combine, conspire, confederate and agree together and with other persons to the grand jurors unnamed or unknown, to distribute heroin, a schedule I controlled substance." The travel act charge alleged he "did knowingly and wilfully travel interstate from Kansas to Las Vegas, Nevada, with the intent to promote a conspiracy to distribute heroin in violation of 21 U.S.C. 846 and thereafter did promote or attempt to promote said unlawful activity, in violation of 18 U.S.C. 1952."

tion of heroin in each count, as well as the primary act of conspiring or traveling with intention to further an unlawful act, had to have been done "willfully and knowingly." Repeating those words twice in a single sentence would be mere surplusage.

Generally, every required mental element must be alleged. *See, e.g.,* Nelson v. United States, 406 F.2d 1136 (10th Cir. 1969) (alleging defendant *knowingly* conspired to cause altered securities to be transported not sufficient when offense also includes element of *fraudulent intent*); Robinson v. United States, 263 F.2d 911 (10th Cir. 1959) (alleging knowingly conspired to sell drugs not sufficient when offense also includes element of *known to be imported contrary to law*). When the same mental element is required for each act, however, an initial recital of that element is sufficient.

Convictions should not be reversed for minor, technical irregularities that do not prejudice the accused. Russell v. United States, 369 U.S. 749, 763 (1962). *See* Fed. R. Crim. P. 52(a). The travel act charge wording is similar to that approved in United States v. Levine, 457 F.2d 1186 (10th Cir. 1972), in which we held it is enough if the count substantially follows the wording of the statute and outlines the elements of the offense and the charges the accused must meet. The indictment here contained a substantially accurate statement of the law and outlined the elements of the offenses charged. We find it adequately warned Stevens of the charges he had to meet.

Appellant's argument that no overt act was charged in the travel act count does not impress us. Overt acts are alleged and were proved in connection with the conspiracy count. We do not think it is necessary to reallege overt acts with respect to the conspiracy in the travel act count, which fairly meets the standard set forth in

Levine. *See* United States v. King, 521 F.2d 61 (10th Cir. 1975); United States v. Levine, 457 F.2d at 1188 n.1.

We find no fatal defects in the indictment.

III

Did the prosecution prove a travel act violation? The elements of such a violation under 18 U.S.C. § 1952(a)(3) are as follows: 1) use of facilities of interstate commerce, 2) with intent to promote, manage, establish, carry on or facilitate any unlawful activity, and 3) performance of or an attempt to perform that unlawful act.

There was sufficient evidence to support the verdict on this charge. Deal and Stevens flew from Kansas City to Las Vegas via commercial airline. A reason for the trip was a prearranged meeting with Childress to try to obtain a good price on a large heroin buy. That the trip was for a vacation as well as for purposes of furthering the conspiracy does not preclude conviction. United States v. Gooding, 473 F.2d 425 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973).

The third element requires for conviction an overt act in furtherance of the conspiracy, performed after the travel. *See* United States v. Peskin, 527 F.2d 71 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976). Childress refused to travel to Las Vegas; both Deal and Childress testified that Deal called him from Las Vegas to induce him to come to that city. The evidence also shows that when this was unsuccessful Deal and Stevens discussed going on to Los Angeles. While the parties did not accomplish a heroin buy in Las Vegas, the telephone calls made by Deal to Childress were overt acts attempting to further the conspiracy within the meaning of the travel act and Stevens is chargeable with those acts. *See, e.g.*, United States v. Peskin, *supra*; United States v. Marquez, 449

F.2d 89 (2d Cir. 1971), *cert. denied*, 405 U.S. 963 (1972); United States v. Barrow, 363 F.2d 62 (3d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

IV

Stevens makes two other arguments in his attack on the conviction, each of which we find lacks merit. We think the proof is sufficient to establish that the interstate travel was from Kansas to Las Vegas, as charged, despite the location of the Kansas City airport in Missouri. Thus, we do not agree there is a fatal variance between the indictment and the proof on this point.

Likewise, we see no merit in the argument that the conspiracy count and the travel act count charge a single crime with respect to which only a single punishment is permissible. "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." Pinkerton v. United States, 328 U.S. 640, 643 (1946). This rule applies with full force to a conspiracy in the travel act context. *E.g.*, United States v. McGowan, 423 F.2d 413 (4th Cir. 1970); United States v. Polizzi, 500 F.2d 856 (9th Cir.), *cert. denied*, 419 U.S. 1120 (1974).

The judgment is affirmed.

APPENDIX B

JANUARY TERM - February 27, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

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No. 77-1937

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

GERROLD E. STEVENS,
Defendant-Appellant.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by appellant.

Upon consideration whereof, it is ordered:

1. The petition for rehearing is denied by Circuit Judges Seth, Holloway and Logan, the members of the panel that rendered the decision sought to be reheard.

2. The suggestion for rehearing having been transmitted to the members of the panel and the judges of the Court who are in regular active service, and no judge in regular active service or a judge who was a member of the panel that rendered the decision having requested a vote on the suggestion, the suggestion for rehearing en banc is denied. Rule 35, Federal Rules of Appellate Procedure.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk